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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DALKON SHIELD CLAIMANTS TRUST, *Petitioner,*

v.

SUSAN SHADBURNE-VINTON, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR AMICUS CURIAE GENERAL MOTORS CORPORATION IN SUPPORT OF PETITIONER

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30 pp

QUESTION PRESENTED

Whether a statute that purports retroactively to repeal a statute of repose, for the express purpose of reviving causes of action that have already been extinguished by the prior statute of repose, violates the Due Process Clause under the controlling authority of *William Danzer & Co. v. Gulf & S.I.R. Co.*, 268 U.S. 633 (1925).

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BRIEF FOR AMICUS CURIAE GENERAL MOTORS CORPORATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

General Motors Corporation ("General Motors") is the world's largest manufacturer of automobiles.

On *four* occasions over the last eight years, the Oregon Legislature has passed special statutes that selectively exempt specific products from Oregon's 8-year statute of repose for product liability action (Or. Rev. Stat. 30.905 (1993)) and purport to revive causes of action that have already been extinguished by the running of the statute of repose. In the

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[1] Counsel for both petitioner and respondent have consented to General Motors Corporation's appearance as *amicus*. Letters evidencing such consent are on file in the Clerk's office.

latest instance, the Oregon Legislature has targeted *one product* made by *one manufacturer* -- General Motors.

From 1973 through 1987, General Motors manufactured pick-up trucks known, generically and collectively, as the C/K model pickup trucks ("C/K pickups"). The various C/K pickups all have their fuel tanks located on the sides of the truck outside the main frame rails but inside the side panels. The Department of Transportation has previously found, after a lengthy investigation, that there is no evidence that the C/K trucks do not meet all relevant federal safety standards regarding the ability of the vehicles' fuel tanks to withstand collision. National Highway Traffic Safety Administration ("NHTSA"), DOT Engineering Analysis EA 92-041 (Oct. 17, 1994), *vacated on other grounds*, 60 Fed. Reg. 13752 (Mar. 14, 1995). Indeed, publicly-available statistics regarding the real-world performance of the C/K trucks demonstrate that they protect their passengers very well in a serious collision. For example, such statistics show that in a side-impact collision there is a greater chance of dying in any of over 500 other vehicles on the road today than in a C/K pickup truck. "Evaluation of the Safety of GM 1973-87 C/K Pickup Trucks -- Exhibits" at Tab J1, General Motors' Submission to NHTSA, DOT EA 92-041 (Jan. 30, 1995.).

On August 19, 1994, Mrs. Anne Kirkwood was driving with her two grandchildren on U.S. Highway 97 in Oregon. Mrs. Helen Fort, who was driving a 1976 C/K pickup in the opposite direction on a two-lane road, lost control of her vehicle, crossed the centerline, and collided with Mrs. Kirkwood's vehicle. There was a post-collision fire. Mrs. Kirkwood and one of her grandchildren were seriously injured, and the other grandchild died.

The C/K truck that Mrs. Fort was driving was 18 years old at the time of the collision. Accordingly, any product liability action concerning the design of Mrs. Fort's C/K pickup truck was extinguished over ten years ago by Oregon's relevant statute of repose -- Or. Rev. Stat. 30.905(1) -- which

provides that "a product liability civil action shall be commenced not later than eight years after the date on which the product was first purchased for use or consumption." Pet. App. 69a.

Not long after the tragic accident, a group called the "Justice for Anne Kirkwood Committee" sponsored Oregon Senate Bill 447 ("SB 447"). The specific purpose of the bill was to allow Mrs. Kirkwood to bring suit against General Motors notwithstanding the statute of repose. *See* Or. SB 447, 68th Legis. Assembly at Preamble (1995) (preamble stating that the bill was introduced "at the request of Justice for Anne Kirkwood Committee").[2] As passed, SB 447 exempts from the 8-year Oregon statute of repose for product liability actions any civil action "against a manufacturer of pickup trucks for death, injury or damage resulting from a fire caused by the rupture of a sidesaddle gas tank in a vehicle collision." SB 447 § 2(2).

Just like the Oregon statutory provision at issue in the petition for *certiorari*, SB 447 also purports explicitly to "revive any cause of action" that had previously been finally extinguished under the Oregon statute of repose. SB 447 § 3(2). General Motors thus has an immediate and direct interest in the outcome of this case, which challenges under the Due Process Clause the Oregon Legislature's ability to repeal Or. Rev. Stat. 30.905 retroactively -- *i.e.*, to revive a cause of action that has already been extinguished by that statute of repose.

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[2] *See, e.g.*, Debate of the Oregon House of Representatives on SB 447, 68th Oregon Legislative Assembly, Reg. Sess., Tape 67, Side B (Mar. 30, 1995) (remarks of Representative Prozanski) ("Yes, this is an individual bill for an individual group of people.").

SUMMARY OF REASONS FOR GRANTING THE WRIT

The petition raises important issues of constitutional law and judicial administration that are worthy of this Court's review. Indeed, the traditional factors considered by this Court in deciding whether to grant *certiorari* militate quite strongly in favor of granting the petition. Specifically:

1. There is a clear split among state and federal courts on the precise issue presented by the petition -- whether a legislature may, consistent with Due Process, retroactively revive causes of action that have already been extinguished by the existing statute of repose.

2. The petition also presents an important issue of judicial administration concerning this Court's central role in the hierarchy of the federal and state courts. In *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989), this Court warned the federal Courts of Appeals that they should not arrogate to themselves the prerogative to overrule a precedent of this Court that is, by its terms, controlling. That is precisely what the Fourth Circuit did in this case, expressly concluding that this Court's decision in *William Danzer Co. v. Gulf & S.I.R. Co.*, 268 U.S. 633 (1925), is "*outdated and no longer valid.*" Pet. App. 11a (emphasis supplied). The D.C. Circuit also effectively overruled *Danzer* in *Wesley Theological Seminary of the United Methodist Church v. United States Gypsum Co.*, 876 F.2d 119 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990). Granting the petition is important to reiterate to the Courts of Appeals that this Court meant what it said in *Rodriquez de Quijas*.

3. The Court of Appeals' effective overruling of *Danzer* is particularly wrong because that case can easily be reconciled with this Court's more recent decisions rejecting Due Process challenges to retroactive civil legislation -- such as *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), and *Pension Benefits Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717

(1984). From the standpoint of judicial administration, at the very least, the Court of Appeals was obliged to *try* to reconcile *Danzer* with *Turner Elkhorn* and *Pension Benefits* before casting it overboard.

The principle that reconciles *Danzer* with these later cases is the fundamental proposition that the Due Process Clause prevents a legislature from simply abolishing property rights that had already accrued under preexisting law. Under this Court's decisions determining what interests rise to the level of a protected property right, it is clear that the defendants in *Turner Elkhorn* and *Pension Benefits* did not have a "property" right in the prior state of the law before the new legislation was enacted. By contrast, the defendant in *Danzer* had a protected property interest in the form of an outright immunity from suit. Similarly, in this case, the Oregon legislature granted defendants an important immunity which, once accrued, rises to the level of a protected property right.

4. The petition presents a recurring issue, which could potentially arise in hundreds of different contexts across the Nation. Oregon has already retroactively extinguished existing rights of repose in four separate contexts. Similar measures have been proposed and enacted in a number of other states in recent years. Unless this Court makes clear that the decision below is incorrect, dozens of other states that have statutes of repose may well be emboldened to try the same thing. Moreover, until decisions such as the one below are reviewed by this Court, *no* defendant *anywhere* can enjoy true "repose" because of the threat that the legislature may decide to abrogate such repose at a later time, without regard for any property rights that have already accrued under preexisting law. That uncertainty has significantly pernicious consequences for many sectors of the Nation's economy.

5. Finally, we respectfully suggest that there is room on this Court's current docket for a case such as this one that presents important issues of constitutional law and judicial

administration. By comparison to other recent years, this Court's current docket is not nearly full.

REASONS FOR GRANTING THE WRIT

As the petition makes clear, this case involves the question of the continued validity of this Court's decision in *William Danzer & Co. v. Gulf & S.I.R. Co.*, 268 U.S. 633 (1925), as further construed in *Chase Secs. Corp. v. Donaldson*, 325 U.S. 304 (1945), *reh'g denied*, 325 U.S. 896 (1945) and *International Union of Elec., Radio and Mach. Workers AFL-CIO, Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976).

In *Danzer*, this Court addressed the constitutionality of a retroactive enlargement of a statutory period for bringing suit. The Court adopted a line of analysis that has become fundamental for courts and legislatures in this area of the law. That analysis distinguishes between a statute of limitations, which erects a mere procedural bar to a plaintiff bringing suit after a specified period, and a statute of repose, which extinguishes any existing liability and thus confers an outright immunity from suit upon potential defendants after the specified period has elapsed.

This Court first drew this distinction in *Danzer*. Some limitations statutes, the Court explained, "relate[] to the remedy only" and do not invest a defendant with any right to be free from suit. *Danzer*, 268 U.S. at 637. Repeal or alteration of such "statutes of limitations" cannot deprive a defendant of any property right in violation of the Due Process Clause. *Id.* at 636-37. But another class of statutes "operate[s] as a limitation on liability" and a defendant accrues a right of repose once the limitation period has run. *Id.* at 637. Retroactively amending such a statute of repose to revive a liability that had already been extinguished under prior law "would . . . deprive [the] defendant of its property without due process of law." *Id.*

Because the statute at issue in *Danzer* belonged to this latter class of statutes, this Court held it unconstitutional.

Twenty years later, in *Chase* this Court reaffirmed the distinction announced in *Danzer*. *Chase* upheld a law retroactively amending a statute of limitations to revive a previously barred claim. This Court observed that such legislation "d[id] not parallel . . . the *Danzer* case" because it "merely . . . reinstate[d] a lapsed remedy" and did not infringe a defendant's "right to immunity." *Chase*, 325 U.S. at 312 n.8.

This Court has never overruled *Danzer* or *Chase*. On the contrary, as recently as 1976, this Court relied upon the distinction embodied in *Danzer* and *Chase* to reject a challenge to a retroactive enlargement of a statute of limitations. *International Union of Elec., Radio and Mach. Workers*, 429 U.S. at 243-44. Nevertheless, both the Fourth Circuit Court of Appeals in this case, as well as the D.C. Circuit Court of Appeals in *Wesley Theological Seminary of the United Methodist Church v. United States Gypsum Co.*, 876 F.2d 119 (1989), *cert. denied*, 494 U.S. 1003 (1990), have explicitly held that they are free to ignore *Danzer* as "outdated," Pet. App. 11a, and/or as "completely defunct," *Wesley*, 876 F.2d at 122.

I. THE PETITION SHOULD BE GRANTED TO RESOLVE A SPLIT AMONG THE FEDERAL COURTS OF APPEALS AND THE STATE SUPREME COURTS.

There is a clear split among the federal courts of appeals regarding whether *Danzer* remains good law and prevents a legislature from abrogating a defendant's accrued substantive right of repose. Indeed, the courts are all over the map on the issue:

While the Fourth Circuit and the D.C. Circuit have concluded that *Danzer* is outmoded and that a legislature is free to abrogate an accrued right of repose (so long as its decision to do so is not irrational), other federal courts have continued

to follow and faithfully apply *Danzer*, holding that Due Process prohibits a legislature from abrogating an accrued right of repose. *In re Alodex Corp. Secs. Litig.*, 533 F.2d 372, 374 (8th Cir. 1976) (per curiam) (affirming "on the basis of the well-reasoned District Court opinion"), *aff'g*, 392 F. Supp. 672, 680-81 (S.D. Iowa 1975) (under *Danzer* and *Chase*, retroactively enlarging applicable period under preexisting statute of repose to revive previously extinguished claim violates the Due Process Clause).

In addition, a number of state courts of last resort have remained faithful to this Court's decision in *Danzer* by holding that the Due Process Clause prevents a legislature from abrogating rights of repose that had already accrued under prior law. *Smith v. Westinghouse Elec. Corp.*, 291 A.2d 452, 455 (Md. 1972) (relying on *Danzer* to invalidate retroactive enlargement of period for bringing suit under wrongful death statute); *Haase v. Sawicki*, 121 N.W.2d 876, 881 (Wis. 1963) ("retrospective extension of the limitation period [in a statute of repose] after its expiration amount[s] to a taking of property without due process of law"); *Colony Hill Condominium I Ass'n v. Colony Co.*, 320 S.E.2d 273, 276 (N.C. Ct. App. 1984) (to "revive a liability already extinguished [by repose] . . . would . . . deprive [defendants] of due process"), *review denied*, 325 S.E.2d 485 (N.C. 1985).

Still other courts -- both state and federal -- have continued to rely on the distinction set forth in *Danzer* and *Chase* to *reject* challenges to the retroactive amendment of statutes of *limitations* (as opposed to statutes of *repose*). For example: *Starks v. S.E. Rykoff & Co.*, 673 F.2d 1106, 1109 (9th Cir. 1982) (because "statutes of limitation go to matters of remedy only," retroactive amendment of such statute is constitutional, distinguishing *Danzer*); *Davis v. Valley Distrib. Co.*, 522 F.2d 827, 830 n.7 (9th Cir. 1975) (*Chase* distinguished *Danzer* on the ground that in *Danzer* "Congress had intended the expiration of the limitation period to put an end to the existence of the liability itself, not to the remedy

alone"), *cert. denied*, 429 U.S. 1090 (1977); *Chevron Chem. Co. v. Superior Court*, 641 P.2d 1275, 1282 (Az. 1982) ("right to raise a one year statute of limitations defense . . . is [not] a vested property right," distinguishing *Danzer*); *Vigil v. Tafoya*, 600 P.2d 721, 725 (Wyo. 1979) (retroactive application of statute of limitations does not contravene Due Process where the "duty [has] not cease[d] to exist even though judicial enforcement is barred by an artificial statute of limitation"); *Roe v Doe*, 581 P.2d 310, 316 (Haw. 1978) (retroactive amendment to statute of limitations is constitutional where "there is no reason to believe that the legislature intended to confer, through the statute of limitations . . . 'a vested right or proprietary interest in immunity from liability'") (quoting *Davis*, 522 F.2d at 830 n.7); *Ohlsen v. J.S.*, 268 N.W.2d 781, 786 (N.D. 1978) ("reviving causes of action previously barred [by a statute of limitations] does not violate the due process clause [because] . . . [defendants] have no vested right in not being made a party" to the suit); *Twomey v. Carlton House of Providence, Inc.*, 320 A.2d 98, 101 n.5 (R.I. 1974) (retroactively restoring a cause of action barred by a statute of limitations is constitutional, but distinguishing statutes, which "as in . . . *Danzer* . . . extinguish the right rather than just the remedy"). These decisions properly recognize the continued vitality of this Court's analysis in *Danzer* and *Chase*.

Finally, several state supreme courts have looked to the distinction drawn by this Court in *Danzer* and *Chase* for guidance in determining what due process requires under their state constitutions. *City of Boston v. Keene Corp.*, 547 N.E.2d 328, 335 (Mass. 1989) (because "the running of the applicable limitations period bars only the legal remedy, while leaving the underlying cause of action unaffected," it "does not create a vested right which cannot constitutionally be taken away"); *School Bd. of Norfolk v. United States Gypsum Co.*, 360 S.E.2d 325, 328 (Va. 1987) (right of repose could not be abrogated by retroactive application of revival statute; *Chase* distinguished on the grounds that it did not involve a statute of repose that "grant[ed] a defendant [a right of] immunity from liability");

Lester v. State Workmen's Compensation Cmm'r, 242 S.E.2d 443, 452 n.15 (W.Va. 1978) (*Danzer* prohibits a state legislature from "extend[ing] a period of limitation after it has expired where the limitation period is considered a part of the substantive right"). These decisions deepen the fault line between the courts that continue to follow *Danzer*, and thus faithfully apply this Court's holding in that decision, and the courts that have taken it upon themselves to overrule *Danzer* and treat it as no longer being good law.

It is thus clear that there is *substantial* confusion in the state and federal courts on this issue. With the federal courts of appeals split on the issue (the Fourth and D.C. Circuits effectively overruling *Danzer* and the Eighth and Ninth Circuits faithfully applying it), there is no reason to believe that the confusion will dissipate. Accordingly, this Court's review is needed.

II. THE PETITION SHOULD BE GRANTED TO MAKE CLEAR TO THE FEDERAL COURTS OF APPEAL THAT THEY SHOULD NOT ACT ON THEIR OWN TO OVERRULE DECISIONS OF THIS COURT.

The petition also raises an important issue of judicial administration.

In *Rodriquez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989), this Court admonished the lower federal courts that the prerogative of overruling a decision of this Court belonged exclusively to this Court. In *Rodriquez de Quijas*, the issue was whether a predispute agreement to arbitrate claims under the Securities Act of 1933 was enforceable. The District Court held that the agreement was not enforceable, relying on this Court's 1953 decision in *Wilko v. Swan*, 346 U.S. 427 (1953), which held that Securities Act claims must proceed in court. The Court of Appeals reversed, concluding that "the arbitration agreement is enforceable because th[e Supreme] Court's subsequent

decisions have reduced *Wilko* to 'obsolescence.'" 490 U.S. at 479 (citation omitted).

Although this Court decided to overrule *Wilko*, it nevertheless admonished the Court of Appeals (there, the Fifth Circuit) for not following it. Speaking for the Court, Justice Kennedy wrote that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Id.* at 484. This is so even where, as was true in *Rodriquez de Quijas*, it is clear as a bell that the prior Supreme Court decision is flatly inconsistent with its subsequent decisions. *See id.* at 480, 481 (observing that *Wilko* was "far out of step with" the Court's subsequent decisions and had been "steadily eroded over the years"). In short, it is simply *not* for the Courts of Appeals to determine that a controlling Supreme Court decision should not be followed because, in their view, subsequent decisions may have undermined it or "reduced [it] to 'obsolescence.'" *Id.* at 479 (citation omitted).

In this case, the Fourth Circuit Court of Appeals flouted Justice Kennedy's admonition in *Rodriquez de Quijas* in the clearest fashion. Nowhere in the decision below does the Court dispute that, if followed, *Danzer* would invalidate the Oregon law at issue in this case.[3] Instead, the Court of Appeals decided that it was free simply to ignore *Danzer*, holding that "[i]n light of this more recent Supreme Court precedent [*e.g.*, *Turner Elkhorn* and *Pension Benefits*], we find that the analysis used by the Court in *Danzer*, *Chase*, and *Campbell v. Holt*, 115

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[3] The statute at issue, Or. Rev. Stat. 30.905(1), is a statute of repose that extinguishes the cause of action at the end of the statutory period. *See Pottratz v. Davis*, 588 F. Supp. 949, 952 (D. Md. 1984) (interpreting Or. Rev. Stat. 30.905); *DeLay v. Marathon LeTourneau Sales & Serv. Co.*, 630 P.2d 836 (Or. 1981). Thus, under *Danzer*, a statute purporting to revive the extinguished claim by retroactively repealing Or. Rev. Stat. 30.905(1) violates the Due Process Clause.

U.S. 620 (1885) is *outdated and no longer valid* for purposes of analyzing the constitutionality of retroactive legislation." Pet. App. 11a-12a (emphasis supplied). It is difficult to imagine a more direct disregard for the rule of *Rodriquez de Quijas*.

And the Fourth Circuit is not the only Court of Appeals to ignore *Danzer*. In *Wesley*, the D.C. Circuit also refused to apply *Danzer* to invalidate a law reviving a claim barred by the District of Columbia's statute of repose. The D.C. Circuit held that the distinction drawn by this Court in *Danzer* and *Chase* between statutes of repose and statutes of limitations "is either *completely defunct* or, at the very most, establishes procedural rules as a safe harbor within which a legislature may freely make retroactive changes." *Wesley*, 876 F.2d at 122 (emphasis supplied).[4] The D.C. Circuit made this statement despite the widespread recognition by courts and legislatures of the important practical and conceptual differences between statutes of limitations and statutes of repose.

It is evident that, unless this Court steps in and reaffirms the rule of *Rodriquez de Quijas*, the lower federal courts will continue to feel free to ignore *Danzer* and other controlling decisions of this Court whenever they determine

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[4] Both the court below and the D.C. Circuit in *Wesley* appeared to denigrate *Danzer* as a "*Lochner*-era" precedent. Yet this characterization ignores the Court's respectful discussion of the *Danzer* holding in such later cases as *Chase* and *Robbins & Myers*. It also glosses over the key infirmity in the *Lochner* line of cases, which essentially disabled legislatures from acting in broad realms of economic and social policy, as distinct from the more procedural point pressed here, which is that the legislature is free to modify or repeal statutes of repose *prospectively*, but can do so retroactively only insofar as it does not purport to extinguish substantive immunities that had already accrued under the preexisting law. If an accrued cause of action is "a species of property protected by the Fourteenth Amendment's Due Process Clause," *Tulsa Professional Collection Servs., Inc. v. Pope*, 485 U.S. 478, 485 (1988), as this Court has repeatedly held, then an accrued immunity from suit must be given similar treatment for purposes of the constitutional analysis.

that their reasoning may be "outdated," Pet. App. 11a, "defunct," *Wesley*, 876 F.2d at 122, or "obsele[te]," *Rodriquez de Quijas v. Shearson/Lehman Bros., Inc.*, 845 F.2d 1296, 1299 (5th Cir. 1988), *aff'd*, 490 U.S. 477 (1989). This Court should grant the petition if for no other reason than to make clear that it meant what it said in *Rodriquez de Quijas*.

III. *DANZER* IS EASILY RECONCILABLE, AND ENTIRELY CONSISTENT, WITH THIS COURT'S SUBSEQUENT DECISIONS UPHOLDING CERTAIN RETROACTIVE CIVIL LEGISLATION.

Rodriquez de Quijas establishes that a Court of Appeals may not overrule or ignore a controlling decision of this Court even when that decision *cannot* be reconciled with later decisions. But here, the Court of Appeals' error is much worse because, far from being "outdated and no longer valid," Pet. App. 11a, *Danzer* is easily reconcilable with this Court's more recent decisions in cases such as *Turner Elkhorn* and *Pension Benefits*.

The reconciling principle is this: the Due Process Clause prohibits a legislature from simply abolishing "property" rights that have already accrued -- *i.e.*, from "depriv[ing] any person of property without due process of law." U.S. Const. amend. XIV. In cases such as *Turner Elkhorn* and *Pension Benefits*, the defendants had no legitimate expectation that rose to the level of a protected "property" right that the retroactive application of the new legislation abrogated. Similarly, in *Chase*, it was reasonable for the Court to conclude that the defendant had no "property" right arising out of a mere procedural limitation on the plaintiff's remedy. By contrast, however, the holding of *Danzer* is that a defendant *does* acquire a protected "property" right once a statutory provision has specifically extinguished a potential cause of action, and thus granted to the defendant an outright immunity from suit.

More specifically: Time and time again, this Court has held that the sort of state-law interests that rise to the level of protected property interests under the Due Process Clause are not limited to interests in real or tangible personal property. Rather, this Court has said that the words "liberty" and "property" in the Due Process Clause "are broad and majestic terms" and "relate to the whole domain of social and economic fact." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571 (1972). The interests that rise to the level of property for purposes of the Due Process Clause are "not limited by a few rigid, technical forms," but rather include "a broad range of interests that are secured by 'existing rules or understandings.'" *Perry v. Sinderman*, 408 U.S. 593, 601 (1972) (citation omitted).

Thus, for example, this Court has held that property interests protected by the Due Process Clause include not only real and tangible personal property, but also such other interests created by state or federal law such as licenses, *Barry v. Barchi*, 443 U.S. 55 (1979) and *Bell v. Burson*, 402 U.S. 535 (1971); causes of action, *Tulsa Professional Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988) and *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); government employment, *Perry*, 408 U.S. 593; welfare benefits, *Goldberg v. Kelly*, 397 U.S. 254 (1970); disability benefits, *Mathews v. Elridge*, 424 U.S. 319 (1976); and utility service, *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978).

In these cases, and others, the Court has articulated a simple and straightforward standard for determining when state law grants a party a protected property interest. The Court has held that if, under state law, the party claiming due process protection merely has "an abstract need or desire for [the benefit]" or a "unilateral expectation of it," then he does not have a property interest that is protected by the Due Process Clause. *Roth*, 408 U.S. at 577. If, however, the party claiming the benefit has "a legitimate claim of entitlement to it" under the law that gives rise to the interest (*e.g.*, state law), then he

has a property interest that may not be abrogated by the legislature. *Id.*[5]

These principles should have been the basis for the Court of Appeals reconciling *Danzer*, *Chase*, *Turner Elkhorn*, and *Pension Benefits*. Thus:

(i) Both *Turner Elkhorn* and *Pension Benefits* involved the retroactive application of new civil legislation where no previous relevant legislation existed. The critical point in those cases is that defendants therein had not been granted any substantive immunity -- any "legitimate claim of entitlement" to immunity -- by the legislature that was abrogated by the new legislation. Rather, the defendants in those cases had, in the words of this Court's due process cases, merely "an abstract need or desire" that they would continue not to be the subject of any regulation. But a mere expectation in the current state of the law is not a protected property interest.

(ii) Similarly, the defendant in *Chase* also did not have any protected property interest. *Chase* involved the retroactive extension of a statute of limitations. It was entirely reasonable for the Court to conclude that a defendant's interest in a true statute of limitations -- which merely limits the plaintiff's remedy but does not grant immunity to the defendant -- does not rise to the level of a protected property interest. A defendant's interest in a statute of limitations can be thought of as that of a mere third-party beneficiary. The defendant is not a direct recipient of any substantive grant of immunity, but rather is merely a third-party beneficiary of the procedural bar that has been erected on the plaintiff's remedy. Thus, it was entirely reasonable for the Court to conclude in *Chase* that

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[5] It makes no difference either that the initial grant of the benefit was entirely a matter of legislative grace, or that the legislature could decide that it will not, prospectively, continue to grant the benefit. What matters is that the legislature took affirmative action that grants a defendant a "legitimate claim of entitlement" that rises to the level of a protected property right. *See Goldberg v. Kelly*, 397 U.S. 254 (1970).

there was no due process violation because there was no deprivation of a protected property right.

(iii) By contrast, the holding of *Danzer* is that the defendant *does* have a protected property interest in a statutory provision, such as a statute of repose, that directly limits the *defendant's* liability as opposed to merely limiting the plaintiff's remedy. A statute such as that in *Danzer*, or a more modern statute of repose, grants an important benefit directly to the defendant that accrues after a specified number of years has elapsed. Once the conditions of the benefit are satisfied (*i.e.*, the requisite number of years passes), the defendant has, in the words of this Court's due process cases, "a legitimate claim of entitlement" to immunity from suit. Once granted under the law, and once accrued through the passage of time, that benefit rises to the level of a protected property interest. This is exactly what this Court held in *Danzer*, concluding that to give retroactive effect to the statute "would [have] be[en] to deprive [the] defendant of its *property* without due process of law." *Danzer*, 268 U.S. at 637 (emphasis supplied).

In short, far from being "no longer valid," *Danzer* is easily reconcilable with *Chase*, *Turner Elkhorn*, and *Pension Benefits* because a defendant has a property right in an accrued right of repose, whereas a defendant has no such property right under either a statute of limitations (*Chase*) or in the mere continuance of the current state of the common law or regulatory law (*Turner Elkhorn* and *Pension Benefits*). This Court should grant the petition in order to explicitly reconcile these two lines of cases, which the Courts of Appeals have proven unable, and/or unwilling, to do.

IV. THE DECISION BELOW RAISES A RECURRING ISSUE THAT COULD AFFECT MANY SECTORS OF THE NATIONAL ECONOMY.

The issue presented by this petition has arisen time and time again, as the shifting political winds have tempted

legislatures periodically to attempt to strip away retroactively the rights of repose that had been conferred upon particular defendants and that had already accrued under the law. The resulting uncertainty about the nature of the right (and reliance upon it) threatens to undermine completely the substantial economic benefit that repose statutes otherwise provide.

Most of the modern statutes of repose, like Or. Rev. Stat. 30.905, were enacted in response to the insurance "crisis" of the late 1960's and 1970's. Michael John Byrne, *Let Truth Be Their Devise: Hargett v. Holland And The Professional Malpractice Statute of Repose*, 73 N.C. L. Rev. 2209, 2220 (1995). This crisis was precipitated by courts around the country abolishing or restricting traditional tort defenses, and thereby exposing defendants to potentially vast liability of theoretically infinite duration. As a result, the number and scope of lawsuits increased dramatically, and insurers were either driven out of the market or forced to raise their rates significantly. *See generally*, Note, *The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 Vand. L. Rev. 627 (1985).

In order to ameliorate the harmful impact of these trends, legislatures around the country enacted "statutes of ultimate repose" that were designed to "fix a limited and predictable time period in which a [potential defendant] would be exposed to a . . . civil action." *Erickson Air-Crane Co. v. United Technologies Corp.*, 735 P.2d 614, 616 (Or. 1987), *modified on other grounds*, 736 P.2d 1023 (Or. 1987). Thus, for example, by 1991, at least forty-six states had enacted repose statutes to protect architects and engineers from otherwise potentially never-ending liability. *See generally Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 827-28 (Mo. 1991). Similarly, by 1995, more than twenty states had enacted product liability statutes of repose. *See generally* Christopher C. McNatt, Jr., *The Push for Statutes of Repose in General Aviation*, 23 Transp. L.J. 323 (Fall 1995). Other common repose statutes offer eventual immunity from

malpractice claims, *see, e.g.*, N.C. Gen. Stat. § 1-15(c) (1983), or from disputes over improvements to real property. *See, e.g.*, N.C. Gen. Stat. § 1-50(5)(a)-(6) (1985). Indeed, many states, like Oregon, have multiple statutes of repose, and thus provide these substantive grants of immunity to many different industries. *See, e.g.*, Or. Rev. Stat. 30.905 (repose for product liability) and Or. Rev. Stat. 12.135(1) (1993) (repose for contractors). Indeed, there are hundreds of repose statutes in effect today that have enormous collective impact on substantial segments of the national economy.

Recently, the federal government has also recognized the important role played by statutes of repose in protecting industry and jobs against potential ruinous and never-ending litigation. Just last year, Congress passed the General Aviation Revitalization Act ("GARA"), 49 U.S.C. § 40101 (1995), which features a federal statute of repose covering general aviation aircraft. GARA "was passed primarily to salvage the American general aviation industry which had been decimated by spiraling litigation costs." McNatt, *supra*, at 324.

This prevalence of statutes of repose -- at both the state and, now, the federal level -- is *itself* sufficient to establish that the issue raised by the petition has the *potential* of arising in a very significant number of cases. But we need not rely merely on the *potential* for the issue to recur, for the issue has already *actually* arisen in many different contexts. For example, Oregon alone has attempted to retroactively abrogate a statute of repose on *four* separate occasions over the last eight years. And many other States have tried to do the same thing in recent years. *See generally Givens v. Anchor Packing, Inc.*, 466 N.W.2d 771, 774-75 (Neb. 1991) (collecting cases).

The effect of such attempts to abrogate accrued rights of repose threatens to vitiate the entire benefit of such statutes. Because of the very nature of "repose," any uncertainty in the state and federal courts effectively destroys much of the benefit that repose is intended to provide, particularly on the setting of insurance rates. For if even *some* courts have held that the

right of repose, even after it has accrued under preexisting law, can be abrogated at will by the legislature, then *no* person *anywhere* can enjoy true repose.

This Court should grant the petition in order to clarify whether the Due Process Clause mandates that a right of repose, once the legal immunity has been granted and has accrued, cannot be abolished retroactively.

V. THERE IS PLENTY OF ROOM ON THIS COURT'S CURRENT DOCKET FOR A CASE SUCH AS THIS ONE THAT RAISES IMPORTANT ISSUES OF CONSTITUTIONAL LAW AND JUDICIAL ADMINISTRATION.

There appears to be plenty of room on this Court's current docket for a case such as this one that raises important issues of constitutional law and judicial administration, and on which there is a split of authority in the state and federal courts.

This Term, the Court will hear argument in only 83 cases. *See* Appendix. That is fewer than half the number of cases that were argued as recently as OT 1988. Moreover, as of today, the Court has granted only 53 petitions this Term, a pace that appears to be well under half that of a decade ago. *Id.* As a result, it is most unlikely that the Court will come close to filling the traditional number of sitting days during OT 1996.

We are not here arguing that the Court's relatively lighter work load justifies granting a petition that does not otherwise warrant the Court's review. Rather, our point is that the clear absence of a crushing workload for the next Term eliminates any need to pass over a petition, such as the present one, that raises important and recurring issues of constitutional law, in order to preserve the Court's necessarily limited resources.

CONCLUSION

For all the reasons stated herein and in the petition for *certiorari*, the petition should be granted.

Respectfully submitted,

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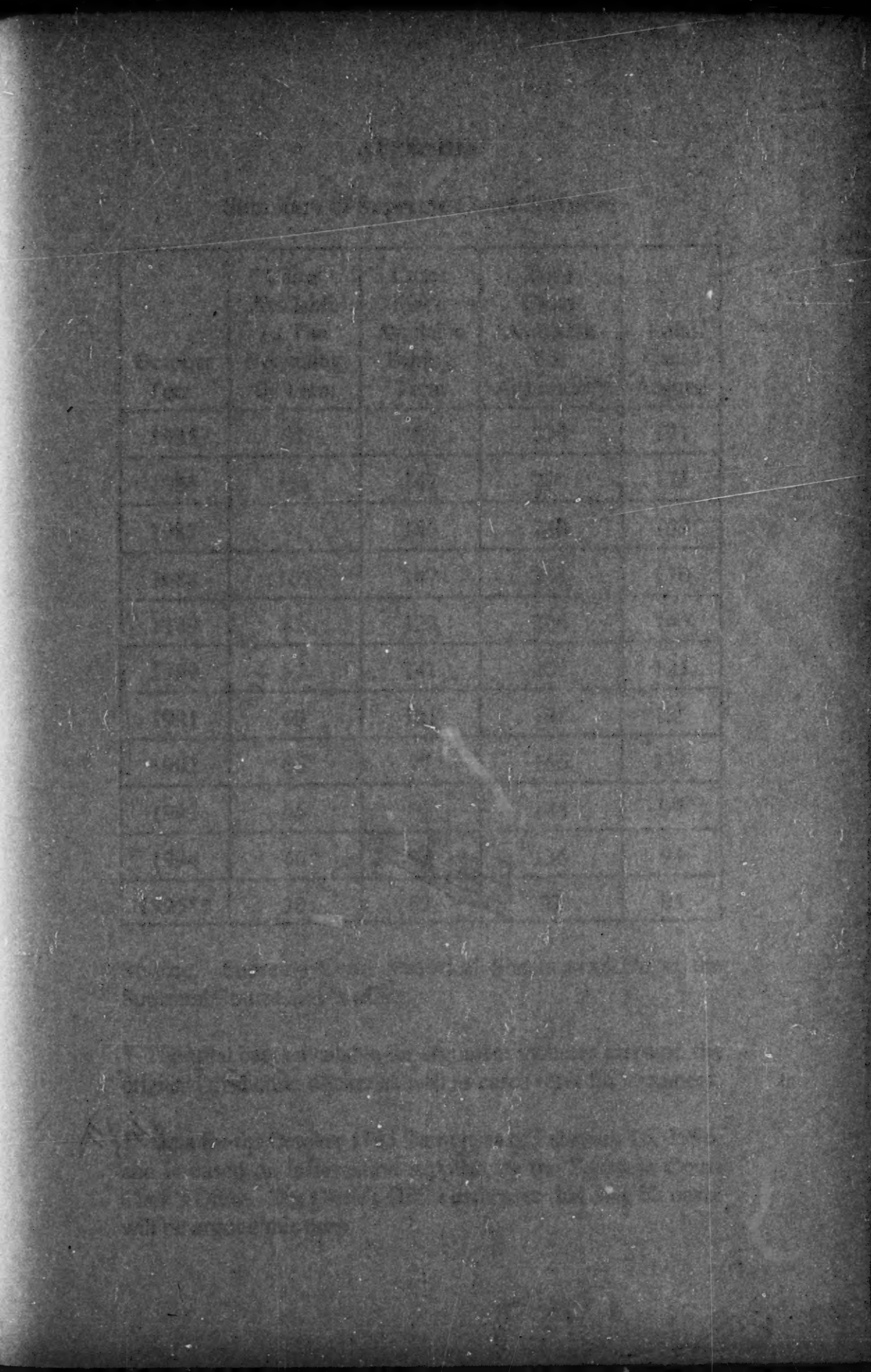

APPENDIX

Summary of Supreme Court Statistics

October Term	Cases Available At The Beginning Of Term	Cases Made Available During Term	Total Cases Available For Argument*	Total Cases Argued
1985	87	187	276	171
1986	101	167	270	175
1987	91	180	280	167
1988	105	147	254	170
1989	81	122	204	146
1990	57	141	201	125
1991	69	121	196	127
1992	66	97	166	116
1993	46	99	145	99
1994	40	93	136	94
1995**	38	53	92	83

Source: Supreme Court Statistical Sheets available at the Supreme Court Clerk's office.

* The total cases available for argument includes cases on the original jurisdiction docket as well as cases reset for argument.

** Data for the October 1995 Term is as of February 16, 1996, and is based on information supplied by the Supreme Court Clerk's Office. The Clerk's Office estimates that only 83 cases will be argued this term.